91-884

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

October Term, 1991

FARM CREDIT SERVICES

Petitioner,

vs.

RAYMOND LIONE MORTER D/B/A SWINENGINEERING, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the language of 11 U.S.C. §541(c)(2) of the United States Bankruptcy Code creates an exclusion from a debtor's bankruptcy estate that is restricted to the debtor's beneficial interest in a traditional spendthrift trust as defined by applicable state law?

2. Whether the Teachers Insurance and Annuity Association Annuity Contract that the Respondent has an interest in is a traditional spendthrift trust as defined by New York State law?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals for the Seventh Circuit; the petitioner in this Court is italicized, all others are respondents:

No. 90-1534

Plaintiff-Appellant: Raymond Lione Morter a/k/a, d/b/a Swinengineering, Inc.

Defendant-Appellee: *Farm Credit Services.*

Amicus Curiae: Teachers Insurance and Annuity Association of America and College Retirement Equities Fund

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Facts	3
Proceedings Below	5
Reasons for Granting the Writ:	
I. THE INTERPRETATION AND JUDICIAL ADMINISTRATION OF 11 U.S.C. §541 (c)(2) IS INCONSISTENT AMONG THE FEDERAL COURTS OF APPEALS. LTIIGATION REGARDING THIS STATUTE HAS CAUSED AN IRRECONCILABLE CONFLICT AMONG THE FEDERAL COURTS OF APPEALS WHICH CAN ONLY BE RESOLVED BY THIS COURT	6
A. The conflict among the federal courts of appeals regarding the interpretation and administration of 11 U.S.C. §541(c)(21 is substantial and irreconcilable	6
II. THIS ISSUE REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT	12

III. RESOLUTION OF THIS CONFLICT IS IMPORTANT TO DECIDING THE CASE SUB JUDICE BUT WILL ALSO HAVE A SUBSTANTIAL IMPACT ON THE PUBLIC. 14

Conclusion 17

Appendix ..... (Separate Volume)

TABLE OF AUTHORITIES

Cases	*Page*
Matter of Goff (5th Cir. 1983) 706 F.2d 574	7, 8, 9, 10
In Re Daniel (9th Cir. 1985) 771 F.2d 1352	9
In Re Graham (8th Cir. 1984) 726 F.2d 1268	9
In Re Lichstrahl (11th Cir. 1985) 750 F.2d 1488	9
In Re Jordan (9th Cir. 1990) 914 F.2d 197	9
McClean v. Central States, Southeast and Southwest Areas Pension Fund (9th Cir. 1985) 762 F.2d 1204	9, 10, 11
In Re Moore (4th Cir. 1990) 907 F.2d 1976	10
In Re Lucas (6th Cir. 1991) 924 F.2d 597	10, 11, 12
In Re Hohl (B. Ct. Il. 1987) 81 B.R. 450	11
In Re Silldorff (C.D. Il. 1989) 96 B.R. 859	11
In Re Dagnall (B. Ct. Il. 1987) 28 B.R. 531	11
In Re Gifford (N.D. In. 1988) 93 B.R. 636	11
In Re Jones (N.D. In. 1984) 43 B.R. 1002	11
McElroy v. United States (1982) 455 U.S. 642, 71 L.Ed.2d 522, 102 S. Ct. 1332	12
Lehman v. Lycoming Co., Children's Services (1982) 458 U.S. 502, 73 L.Ed.2d 928, 102 S. Ct. 3231	12
New York v. Saper (1946) 336 U.S. 328, 93 L.Ed. 710, 69 S.Ct. 554	13
Kokoszka v. Belford (1974) 417 U.S. 642, 41 L.Ed.2d 374, 94 S. Ct. 2431	13, 16
Shepairo v. U.S. (1947) 335 U.S.1, 92 L.Ed. 1787, 68 S.Ct. 1375	13

Commissioner of Internal Revenue v. Vilder (1962) 369 U.S. 499, 8 L.Ed.2d 65, 82 S. Ct. 881 13

Aldinger v. Howard (1976) 427 U.S.1, 49 L.Ed.2d 276, 96 S. Ct. 2413 13

In Re Cress (S.D. Ind. 1991) 127 B.R. 194 15

In Re O'Brien (E.D. Va. 1985) 12 C.B.C.2d 1161 16

In Re Reagan (5th Cir. 1984) 341 F.2d 95 16

In Re Sundeen (C.D. Il. 1986) 62 B.R. 619..... 16

In Re Werner (D. Mn. 1983) 31 B.R. 418..... 16

Statutes

I.C. 34-2-28-1(a)(3)..... 2, 5, 6, 7

I.C. 27-2-5-1 3

11 U.S.C. §541(a)(1) 5, 7

11 U.S.C. §541(c)(1)(A)..... 7

11 U.S.C. §541 (c)(2) 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16

Other

Black's Law Dictionary 6

S. Rep. No. 95-99, 95th Cong., 2d Sess. 82 (1978)..... 7

HR Rep. No. 95-595, 95th Cong., 2d Sess. 369 (1977).. 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in *Raymond Lione Morter a/k/a, d/b/a Swinengineering, Inc. vs. Farm Credit Services*, No. 90-1534, on July 16, 1991. The judgment reversed the United States District Court for the Northern District of Indiana and ruled that the respondent's Teachers Insurance and Annuity Association Annuity/Retirement Plan was excluded from his bankruptcy estate under 11 U.S.C. §541(c)(2).

OPINIONS BELOW

The decision of the Seventh Circuit of July 16, 1991 is reported at 937 F.2d 354. (Appendix p. A-32)

The decision of the district court of February 6, 1990 is reported at 110 B.R. 390. (Appendix p. A-22)

The decision of the United States Bankruptcy Court Northern District of Indiana Hammond Division at Gary/Lafayette, Bankruptcy No. 86-40369, by the Chief Judge, Kent Lindquist on July 7, 1989, held that the Respondent's interest in his retirement plans were property of the bankruptcy estate and that the only exemption the respondent could take was a $100.00 intangible personal property exemption allowed by Indiana law. I.C. 34-2-28-1(a)(3). (Appendix p. A-3)

JURISDICTION

The judgment to be reviewed was entered on July 16, 1991. No petition to rehear the judgment was filed.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute under review in this case, 11 U.S.C. §541(c) provides in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable non-bankruptcy law —
>
> (A) that restricts or conditions transfer of such interest by the debtor; or
>
> (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking

possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law in enforceable in a case under this title.

STATEMENT OF THE CASE

Facts

On June 4, 1986, Respondent filed his petition for relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division at Lafayette. The Respondent's schedule B-4 identified that he had at the time of filing an interest in two annuities identified as the College Retirement Equity Fund ("CREF") and the Teachers Insurance and Annuity Association ("TIAA").

At the time the Respondent filed his Chapter 7 petition, he was an employee of Purdue University. The Respondent's interests in these two annuities were also described as the Purdue University TIAA-CREF Retirement Plan ("Plan"). The respondent valued his interest in the TIAA plan and his interest in the related CREF plan at $280,795.86 and claimed this entire amount as exempt pursuant to I.C. 27-2-5-1 and I.C. 34-2-28-1 (Indiana Code 1980). (Appendix p. 1)

Purdue University pays the entire cost of participation in the Plan and a participant may make voluntary extra payments to the Plan but the Respondent made no voluntary extra payments. The Plan contains anti-alienation language which essentially prohibits assignment and protects the Respondent's interest in the Plan from the claims of creditors. The Plan does not provide for loans or cash surrender. The Respondent is 100% vested in the Plan. The Respondent's date of birth

is September 7, 1920. The Plan states that annuity income generally begins at the normal retirement age. The normal retirement age is defined in the Plan as the age of 66 for participants employed prior to July 1, 1948 and age 65 for participants employed after July 1, 1948. From August 1, 1959 to August 30, 1960, Respondent participated in the Plan as an employee of Iowa State University. Effective July 1, 1960, Respondent began his employment at Purdue University. Respondent has been a participant in this Plan since August 1, 1959 and the normal age of retirement applicable to Respondent is 65. Mandatory retirement age is identified by the Plan as age 70. Once Respondent retires, he can chose from several options regarding payment of annuity benefits.

Respondent was forced to retire at age 70 in the fall of 1990 because of Purdue's mandatory retirement policy. As a condition of his employment at Purdue, Respondent was required to participate in Purdue University's retirement plan.

The TIAA component of the plan is a non-profit, legal reserve life insurance policy that promises to pay a fixed annuity for life based on a contractually guaranteed rate of return, plus dividends, when a beneficiary reaches retirement age. When a participate retires, TIAA applies pre-retirement contributions to purchase a fixed annuity contract for the participant's benefit. TIAA places the pre-retirement accumulations in the payout annuity pool. The Plan then evaluates the participants life expectancy and calculates benefits for him. The Plan adjusts the benefits of all other participants in the annuity pool based on that expectancy. If the participant dies before the time projected, the other participants in the pool will have more funds available to them. If the participant outlives TIAA's projection, the contributions of the other participants to the annuity pool will be used to continue the contractually guaranteed benefits and dividends as declared. Annuity income begins not longer than April 1st of the calendar year following the year in which an annuitant attains the age of 70 1/2 years.

Proceedings Below

At the time Respondent filed his Chapter 7 bankruptcy petition, he was indebted to Petitioner by virtue of a promissory note and mortgage executed on or about December 17, 1980. The original loan was made by the Federal Land Bank of St. Paul to Respondent, R. William Morter and Carol A. Morter in the original sum of $300,000.00. Subsequent to the abandonment of the real estate securing this debt, the foreclosure of the mortgage and sale of the real estate, Respondent remains indebted to Petitioner in the sum of $66,293.48.

This litigation began on August 8, 1986 when Petitioner filed its objection to Respondent's schedule B-4 and specifically the Respondent's assertion that his interest in the plan was exempt. The standing Chapter 7 Trustee also filed an objection to this exemption claimed by Respondent. This matter was submitted to the Bankruptcy Court by way of a stipulation of facts filed by counsel for Petitioner, the Trustee and counsel for Respondent.

On July 6, 1989, the Bankruptcy Court issued a memorandum and order ruling that the objections to Respondent's claimed objections are sustained and the TIAA and CREF annuity contracts are property of Respondent's estate pursuant to 11 U.S.C. §541(a)(1). The Bankruptcy Court also ruled that the only exemption that is allowable on these annuity contracts is $100.00 as an intangible personal property right pursuant to I.C. 34-2-28-1(a)(3).

Respondent filed a timely Notice of Appeal from the order of the Bankruptcy Court. The District Court on February 6, 1990 found that the CREF components of Respondent's retirement plan is excluded from the bankruptcy estate pursuant to 11 U.S.C. §541(c)(2). The District Court further found that the TIAA annuity contract is not a trust and Respondent's interest in the TIAA annuity contract was an asset of the bankruptcy estate. The case was remanded for determination of the value of the TIAA Plan. The District Court also specifically found that

the Bankruptcy Court correctly applied Indiana law regarding the Indiana exemption statute then in existence and properly determined that the only allowable exemption on the annuity contract is the $100.00 intangible personal property exemption identified at I.C. 34-2-28-1(a)(3).

On March 6, 1990 Respondent filed his Notice of Appeal. On July 16, 1991 the United States Court of Appeals for the Seventh Circuit found that both the TIAA and CREF components of Respondent's retirement Plan are "exempted" from the bankruptcy estate under 11 U.S.C. §541(c)(2). The part of District Court's judgment including the TIAA portion of Respondent's retirement plan in the bankruptcy estate was consequently reversed.

REASONS FOR GRANTING THE WRIT

I. THE INTERPRETATION AND JUDICIAL ADMINISTRATION OF 11 U.S.C. §541(c)(2) IS INCONSISTENT AMONG THE FEDERAL COURTS OF APPEALS. LITIGATION REGARDING THIS STATUTE HAS CAUSED AN IRRECONCILABLE CONFLICT AMONG THE FEDERAL COURTS OF APPEALS WHICH CAN ONLY BE RESOLVED BY THIS COURT.

A. The conflict among the federal courts of appeals regarding the interpretation and administration of 11 U.S.C. §541(c)(2) is substantial and irreconcilable.

Courts are certainly split on the factors for determining whether a given set of restrictions on transfer and a bankruptcy debtor's access are sufficient to warrant exclusion of a retirement or pension plan from a bankruptcy estate under 11 U.S.C. §541(c)(2). A spendthrift trust is a trust "created to provide a fund for the maintenance of a beneficiary and at the same time to secure the fund against his inprovidence or incapacity." *Blacks Law Dictionary* p. 1400 (6th ed. 1990). Characterizing a retirement plan as a spendthrift trust is another way of stating the conclusion that it must be excluded from the

bankruptcy estate. Exclusion from the bankruptcy estate prohibits creditor access.

A majority of the courts of appeals that have reviewed this issue, have held that a retirement plan must constitute a traditional spendthrift trust under applicable state law to be excluded from the estate.

Initially, the Bankruptcy Code was intended to create a more uniform and comprehensive scope to "property of the estate" which is subject to the reach of a debtor's creditors than had previously existed under the old Bankruptcy Act. S.Rep. No. 95-99, 95th Cong., 2d. Sess. 82 (1978). Under Section 70(a) of the earlier Act, the inclusion of an asset within the estate varied in accordance with an individual examination of the legal nature of the asset and in light of the purposes of the Bankruptcy Act. The designated policy was to secure for the benefit of creditors everything of value the bankrupt might possess in alienable or leviable form, but to permit a bankrupt to accumulate new wealth after the date of his petition and to allow him an unencumbered fresh start. *Matter of Goff*, (5th Cir. 1983) 706 F.2d 574. Under §541 of the Code, all property in which a debtor has a "legal or equitable interest" at the time of the bankruptcy comes into the estate, 11 U.S.C. §541(a)(1). This is so "notwithstanding any provision [except as recognized in subsection (2)] that restricts or conditions transfer of such interest by the debtor." *Id.* The sweeping scope of this automatic inclusion was intended to remedy much of the old Act's perceived deficiencies. "The Act was a complicated melange of references to State law, and did little to further the bankruptcy policy of distribution of the debtor's property to his creditors in satisfaction of his debts." Matter *of Goff, supra*, at 578. The broad definition of property in the Bankruptcy Code is further emphasized in the language of §541(c)(1)(A). It provides, with one caveat, that "any provision that restricts or conditions transfer" of property of the debtor is ineffective in bankruptcy to keep the property from becoming part of the estate. 11 U.S.C. §541(c)(1)(A). The caveat situation, in which a

restriction will keep property free from the estate, is set out in subsection (2):

> A) a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law in enforceable in a case under this title.

11 U.S.C. §541(c)(2). The plethora of litigation that has developed around this Code section is based upon the interpretation of the phrase "under applicable non-bankruptcy law." Debtors seeking to protect their interests in retirement or pension plans argue that such a property interest shall be excluded from the bankruptcy estate if the terms of their pension or retirement plans contain any restrictions against assignment or alienation and any prohibitions against access.

The majority of Courts of Appeals deciding this issue have ruled that Congress intended to exclude only trust funds in the nature of spendthrift trusts from the property of the estate. This conclusion is generally reached through a three step analysis. First by an examination of the legislative intent behind the broad reference in §541(c)(2) to "applicable non-bankruptcy law." Second by consideration of the overall congressional scheme envisioned in the Bankruptcy Code, particularly the exemption election provision of §522 which directly addresses the degree to which pensions may be exempted and the relationship and effect upon ERISA of the Bankruptcy Code. The conclusion most courts have reached is that the legislative intent along with existing statutory law lead to the conclusion that §541(c)(2)'s reference to "applicable non-bankruptcy law" was an acknowledgment of traditional state spendthrift trust law. *Matter of Goff, supra.* The court in *Goff* reviewed the legislative history of §541(c)(2) and emphasized that all references to granting a debtor an exclusion from property of the estate are restricted to a debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law. H.R. Rep. No. 95-595, 95th Cong.2d Sess. 369 (1977); S. Rep. No. 95-989, 95th Cong.2d Sess. 83. The

recurring references to applicable State law in this legislative history convinced the court in *Goff* that Congress intended by its reference to "applicable non-bankruptcy law" in §541(c)(2) to exempt from the estate only those spendthrift trusts traditionally beyond the reach of creditors under state law. *Id.* at 582.

Most Circuits which have considered this issue, have adopted the holding in *Goff*. The court in *In Re Daniel* (9th Cir. 1985) 771 F.2d 1352 ruled that the phrase "applicable non-bankruptcy law" in 11 U.S.C. §541(c)(2) was intended to be a narrow reference to state spendthrift trust law and not a broad reference to all other federal laws, including ERISA and the Internal Revenue Code, which prohibit alienation. This court specifically ruled that ERISA-qualifying pension plans containing anti-alienation provisions are excluded pursuant to §541(c)(2) only if they are enforceable under state law as spendthrift trusts. See *In Re Graham* (8th Cir. 1984) 726 F.2d 1268; *In Re Lichstrahl* (11th Cir. 1985) 750 F.2d 1488 and *In Re Jordan* (9th Cir. 1990) 914 F.2d 197.

Other Circuits have not followed the above cases and have interpreted the legislative history of §541(c)(2) as being more broad and not limited to traditional spendthrift trusts. In *McClean v. Central States, Southeast and Southwest Areas Pension Fund* (4th Cir. 1985) 762 F.2d 1204, the court stated that §541(c)(2) should not be confined in its recognition of enforceable transfer restrictions to those found in traditional spendthrift trusts. The court stated that the language of the statute and its legislative history do not identify a requirement that a trust be traditional nor is there any definition of what might be found to constitute a traditional trust. Consequently, this court held that the debtors interest in an ERISA qualified pension plan is not property of the estate and, therefore, the proper subject of a Chapter 13 Trustee's pay order because the anti-assignment provisions contained in the pension plan were enforceable under Illinois spendthrift trust law even though the pension plan may not have constituted a traditional spend-

thrift trust under Illinois law. The courts that have followed *McClean's* reasoning have characterized their interpretation of §541(c)(2) as less limiting than the statutory interpretation followed by the courts following the reasoning in *Goff*. The courts following *McClean* reject the contention that §541(c)(2) should be confined in its recognition of enforceable transfer restrictions to those found in traditional spendthrift trusts. These Circuits emphasize that if Congress had intended §541(c)(2) to only apply to state spenthrift trusts the term spendthrift trust would have appeared in the statute rather than the phrase "applicable non-bankruptcy law." *In re Moore* (4th Cir. 1990) 907 F.2d 1476. "The term 'applicable non-bankruptcy law' suggests no limitation to state spendthrift trust law, and we refuse to read such a limitation into the statute." Id. at 1478.

Due to this irreconcilable conflict, Circuits that must decide an issue depending upon the interpretation and application of 11 U.S.C. §541(c)(2), must choose between the 2 above identified positions. At this time, there is no uniform rule regarding the interpretation and application of §541(c)(2).

The court in, *In Re Lucas* (6th Cir. 1991) 924 F.2d 597, had to decide whether a savings and retirement plan, identified as an ERISA-qualified pension plan, was property of the debtor's bankruptcy estate and thus subject to turnover to the trustee in bankruptcy. As this court began to analyze this issue and the applicability of §541(c)(2) it stated; "There is a split among the courts which have considered the issue of whether ERISA constitutes "non-bankruptcy law." Several circuits have interpretated the phrase narrowly relying on the legislative history to hold that §541(c)(2) was intended to refer only to state spendthrift trust law." *Id.* at 600. The court stated that under this majority view, only those ERISA pension plans which qualify as spendthrift trusts under the applicable state law will be excluded from property of the bankruptcy estate. This court went on to say that a minority of courts have held that ERISA does constitute applicable non-bankruptcy law and ERISA

benefits which are subject to that act's anti-alienation provisions are excluded from the bankruptcy estate under §541(c)(2). The court in *Lucas* emphasized that the courts adopting this position have relied on the "plain language of the statute, which on its face does not limit applicable non-bankruptcy law to state spendthrift trust law." *Id.* This court did not review the legislative history as it deemed such a review improper as the language in §541(c)(2) was deemed to be unambiguous.

The case sub judice is a good example of the confusion created by this conflict. As noted above, the majority of courts that have ruled on this issue have followed *Goff.* Only the Fourth Circuit Court of Appeals had ruled contrary to *Goff* on this issue prior to the recent decision in *Lucas.* Prior to the Seventh Circuit Court of Appeals decision in the case sub judice, all of the reported bankruptcy court decisions and all of the district court decisions that analyzed §541(c)(2) within the jurisdiction of the Seventh Circuit Court of Appeals supported the majority position. These courts uniformally ruled that §541(c)(2) only provides for an exclusion from the bankruptcy estate for the debtor's interest in a traditional spendthrift trust as defined by relevant state law. See *In Re Hohl* (B.Ct. Il. 1987) 81 B.R. 450; *In Re Silldorff* (C.D. Il. 1989) 96 B.R. 859; *In Re Dagnall* (B.Ct. Il. 1987) 78 B.R. 531; *In Re Gifford* (N.D. In. 1988) 93 B.R. 636 and *In Re Jones* (N.D. In. 1984) 43 B.R. 1002. Despite this great weight of authority uniformally analyzing the phrase "applicable non-bankruptcy law" in §541(c)(2), the Seventh Circuit Court of Appeals opted to follow the Court's decision in *McClean* and ruled that the plain language of §541(c)(2) does not require that a retirement plan be a traditional spendthrift trust to gain an exclusion from a bankruptcy estate.

At the present time, four Circuits have ruled that the language of §541(c)(2) refers to a traditional spendthrift trust as defined by state law. Three Circuits have ruled that §541(c)(2) is not so restrictive and that any plan that has anti-alienation

language that is enforceable under state law will gain the exclusion provided for under this section.

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on issues that are in direct conflict among the federal courts of appeal. This is especially true when the conflict among the Circuits is on an issue of statutory construction. *McElroy v. United States* (1982) 455 U.S. 642, 71 L.Ed.2d 522, 102 S.Ct. 1332; *Lehman v. Lycoming Co. Children's Services* (1982) 458 U.S. 502, 73 L.Ed.2d 928, 102 S. Ct. 3231.

The conflict among the Circuits regarding the construction of this Bankruptcy Code section continues. The decision by the Seventh Circuit Court of Appeals exemplifies and emphasizes the uncertainty that this conflict has created among the bar and the judiciary. So long as this conflict is allowed to continue, the litigation regarding this issue will continue to proliferate. A decision from this Court is the only means by which this conflict can be resolved.

II. THIS ISSUE REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The conflict regarding the interpretation and application of §541(c)(2) of the Bankruptcy Code is a recurring issue. Each court faced with this issue must choose from conflicting decisions to determine how to interpret and apply the provisions of §541(c)(2). See *In Re Lucas, supra*. There is presently no consistent guideline regarding how to interpret and apply this significant Bankruptcy Code section.

Whenever there is a conflict among the Circuits regarding a matter of administration of the Bankruptcy Code, this court has intervened to resolve the conflict and clarify the application

of the Bankruptcy Code. *New York v. Saper* (1946) 336 U.S. 328, 93 L.Ed. 710, 69 S.Ct. 554. This Court has held that the dual purpose of the Bankruptcy Code is to convert the estate of the bankrupt into cash and distribute same among the bankrupt's creditors and to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. *Kokoszka v. Belford* (1974) 417 U.S. 642 41 L.Ed.2d 374, 94 S.Ct. 2431.

This conflict among the Circuits has caused substantial confusion regarding the meaning of an important Bankruptcy Code section. Individuals eligible for protection under the Bankruptcy Code may be reluctant to seek such protection from their creditors due to the uncertainty regarding creditor accessability to retirement or pension assets. Further, the creators or settlors of retirement and pension plans are left with uncertainty regarding the ability of their plans to resist creditor access. A national retirement plan such as the Teachers Insurance and Annuity Association of America ostensibly could be subjected to different results regarding creditor access depending on what Circuit their retirement plan is challenged in.

This Court has assumed certiorari jurisdiction to resolve a conflict that involves an intolerable conflict of statutory construction. *Shepairo v. U.S.* (1947) 335 U.S. 1, 92 L.Ed.2d 1787, 68 S. Ct. 1375. A decision from this Court is the only means by which the interpretation and application of §541(c)(2) can be resolved and an uniform national rule be identified. A uniform rule regarding this Bankruptcy Code section is desparately needed to reduce the conflicting litigation in this matter and to end the present war of words amongst the Federal Circuit Courts of Appeals who are confronted with this issue. See *Commissioner of Internal Revenue v. Vilder* (1962) 369 U.S. 499, 8 L.Ed.2d 65, 82 S.Ct. 881. The only means by which this conflict on this important federal question can be resolved is by the review and resolution of this issue by this Court. *Aldinger v. Howard* (1976) 427 U.S. 1, 49 L.Ed.2d 276, 96 S.Ct. 2413.

III. RESOLUTON OF THIS CONFLICT IS IMPORTANT TO DECIDING THE CASE SUB JUDICE BUT WILL ALSO HAVE A SUBSTANTIAL IMPACT ON THE PUBLIC.

Petitioner has argued throughout this litigation that 11 U.S.C. §541(c)(2) provides for an exclusion from the bankruptcy estate only for a debtor's interest in a traditional spendthrift trust. As indicated above, this position is supported by a majority of Federal Courts of Appeals who have decided the issue. This interpretation of §541(c)(2) is significant to the case sub judice as it effects the analysis of the Respondent's interest in the TIAA pension plan.

Petitioner has argued that the TIAA plan is nothing more but an annuity insurance contract. The Bankruptcy Court agreed with the Petitioner as well as the District Court. Because the courts below characterized the Debtor's interest in the TIAA Plan an interest in an annuity insurance contract, the exclusion provided for in §541(c)(2) was not applicable to the Respondent and Petitioner and the Respondent's other creditors were ruled to have access to this substantial asset.

The interpretation of §541(c)(2) is critical to the ultimate decision of whether or not Petitioner has access to the Respondent's retirement fund. The Respondent's retirement plan has anti-alienation language that is enforceable under state law. Assuming that the correct interpretation of §541(c)(2) is that followed by the majority of Circuits, the presence of this anti-alienation language is not sufficient to preclude creditor access to the retirement fund. Under the majority analysis, the retirement plan must be a traditional spendthrift trust to gain exclusion from the bankruptcy estate. An annuity insurance contract that contains enforceable anti-alienation language is not sufficient to gain the §541(c)(2) exclusion.

The majority rule adds certainty to an analysis under §541(c)(2). As exemplified by the decision of the Seventh Circuit Court of Appeals, utilization of the minority rule causes a

reviewing court to begin a substantial analysis of the terms of the subject retirement plan to reach a decision. If the minority rule is adopted, then the reviewing court must then decide if the subject retirement plan has sufficient indicia of a spendthrift trust to gain the exclusion. This fact specific analysis creates uncertainty and instigates litigation as there is no uniform rule as to what constitutes sufficient indicia of a spendthrift trust to gain the §541(c)(2) exclusion. The Seventh Circuit conducted an extensive examination of the Respondent's interest in the TIAA retirement plan and concluded that sufficient indicia existed to gain the exclusion. Petitioner respectfully believes that this decision is in error by its failure to follow the majority rule. The acceptance of the majority rule would result in a different decision, a decision which would affirm the District Court's analysis.

Petitioner believes that the acceptance of the majority rule regarding the interpretation and application of §541(c)(2) provides a more uniform rule and would eliminate or at least restrict the problematic analysis a reviewing court must undertake to determine if sufficient indicia of a spendthrift trust exist to gain exclusion. The majority rule mandates that a debtor's interest must consist of a traditional spendthrift trust as defined by applicable state law. Petitioner believe this creates a more certain, objective and consistent rule for applying this section of the Bankruptcy Code. Section 541 (c) (2) is an exclusion provision. As such it is strictly construed. *In Re Cress* (S.D. Ind. 1991) 127 B.R. 194. Limiting "applicable nonbankruptcy law" to state spendthrift law effects a narrow construction of §541(c)(2), construes §541(a) broadly, and carries out the Code policy of marshalling the debtor's assets for the benefit of creditors. "Section 541(c)(2) is the only express exception to the general rule of §541(c)(1) which generally invalidates restrictions on the transfer of property." *Id.* at 198.

The resolution of this conflict is important also for public policy reasons. This Court has recognized that the purpose of the Bankruptcy Code is to convert the estate of the bankrupt

into cash for distribution among creditors but also to give the bankrupt a fresh start with such exemptions and rights as the Code designates. *Kokoszka, supra.* What needs to be established by this Court is what rights are being granted by the Bankruptcy Code pursuant to §541(c)(2). 11 U.S.C. §541(a) identifies what property becomes part of a bankrupt's estate. If a property interest is found to exist, the property becomes a part of the estate and automatically passes to the trustee on the filing of the petition in bankruptcy, unless otherwise excluded. *In Re O'Brien* (E.D. Va. 1985) 12 C.B.C.2d 1161. Section 541 includes in the estate all the property of the debtor, even property needed for a fresh start. The exemptions and exclusions in the Bankruptcy Code are designed to meet the purpose of retaining for the bankrupt property sufficient for a fresh start. *In Re Reagan* (5th Cir. 1984) 741 F.2d 95. The assets available to a bankrupt for a fresh start are specifically limited by the exclusion and exemption scheme of the Code. It is not the intent of the Bankruptcy Code to allow a debtor to obtain a bankruptcy discharge and subsequent to that discharge have access to a substantial asset. *In Re Sundeen* (C.D. Il. 1986) 62 B.R. 619; *In Re Werner* (D. Mn. 1983) 31 B.R. 418. If the exclusion rule of §541(c)(2) is not as specific as possible, then what form of property interest that can qualify for this exclusion is left to speculation. The less specificity provided by §541(c)(2) the greater potential for speculation and related litigation.

Petitioner believes that the majority rule provides the specific rule necessary to limit this potential speculation. Simply, under the majority rule a debtor must have a retirement plan that constitutes a traditional spendthrift trust under applicable state law. Under the minority rule a debtor can qualify for the exclusion if his interest in his retirement plan is deemed to have sufficient indicia of a spendthrift trust. What constitutes sufficient indicia of a spendthrift trust is open to speculation and creates the mountain of litigation that has been generated by the conflict regarding the interpretation of §541(c)(2).

This conflict cries out for an examination by this Court. Only this Court has the ability to resolve this conflict and establish a uniform rule regarding this issue of interpretation and administration of this section of the Bankruptcy Code. Sup. Ct. R. 10.1(a) & (c).

CONCLUSION

The writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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